



# COPYRIGHT CLAIMS BOARD

Docket number: 23-CCB-0066  
April 3, 2023

Michelle Milano

CLAIMANT

V.

Eliza Davis

RESPONDENT

## ORDER TO AMEND NONCOMPLIANT CLAIM

The Copyright Claims Board finds that your claim does not comply with the requirements of the CASE Act and related regulations. The claim cannot move forward unless it is amended.

If you wish to proceed with this claim, you must file an amended claim by **May 3, 2023**. If you do not, the Board must dismiss your claim without prejudice, although you may file again in the future before the Board or in federal court. If you file an amended claim and it is found compliant, you will be notified and directed to proceed with service. There is no additional filing fee for an amended claim. 17 U.S.C. § 1506(f)(1)(B).

To make your amended claim compliant, you must resolve the issues identified below. [37 C.F.R. § 224.1\(c\)\(2\)](#). You may also choose to correct or edit any errors or other information in your claim before you file it again. You do not need to provide a legal argument in your claim – just a statement of facts and circumstances. Being specific in your description gives the other party and the Board more information about your claim. There is no character limit, so please be as detailed as possible.

### Copyright Infringement – Elements

You have brought a copyright infringement claim before the Board. Your claim must make enough factual allegations to support each “element” of the claim. Information about the elements required to assert a claim of copyright infringement is available in the [Starting an Infringement Claim](#) chapter of the CCB Handbook. The elements of a copyright infringement claim are:

1. You own a valid copyright in the work, or have been given an exclusive license to the copyright rights at issue in the work,
2. The respondent used one of your exclusive rights in the work without permission,
3. The respondent had access to your work, and
4. The respondent’s work is substantially similar to the original elements of expression in your work.

Your claim does not clearly present enough facts to support the elements of the claim related to the respondent’s infringing activity, access to your work, and substantial similarity, as discussed further below.

## Copyright Infringement – Infringing Activity

Your claim does not present enough facts to clearly state how the respondent used any of your exclusive rights in the allegedly infringed work without permission.

Copyright law grants exclusive rights to copyright owners. These include the right to reproduce, distribute, and publicly display the work, and to make a “derivative work,” which is a work based on the original work. Someone who does one of those activities without the copyright owner’s permission may infringe the copyright, unless they have a legitimate defense. More information about exclusive rights is available on page 3 of the [Starting an Infringement Claim](#) chapter of the CCB Handbook.

Your claim does not clearly discuss the respondent’s allegedly infringing activity in any detail or in a way that can be clearly understood. In your claim you state that the respondent is “Making a derivative of my work as well as full defamation of character, harassment, incorrect statements, and cyber stalking.” A derivative work is a work based on or derived from one or more already existing works. Derivatives can include annotating, editing, translating, modifying or making other types of changes to the work. Common derivative works include translations, musical arrangements, motion picture versions of literary material or plays, art reproductions, abridgments, and condensations of preexisting works. Your short statement does not include any factual allegations that explain how the respondent allegedly created an infringing derivative work. In addition, in the “Description of harm suffered and relief sought” section, you focus on “personal phone call/hang ups”, “online negative comments” and physical and mental harm which do not explain how the respondent may have made a derivative of you work.

You have raised additional allegations, but not within the claim form. The Board claim form is a standardized form, available on [eCCB](#), where claimants must enter all relevant allegations. [37 C.F.R. § 222.2\(a\)\(1\)](#). In one of your [supplementary documents](#), you assert, “I believe they are infringing on my future rights as my copyright information includes herbal based fairy balls based on the metaphysical properties of the herbs included. My copyright includes the glass ball, glitter, and specified herbs based on their metaphysical properties. The looks is the same to the copyright I own.” In another document that you submitted after the claim, you assert, “her item is a 90% recreation of the item I have made.” Allegations in support of the claim must be made in the standard claim form. [37 C.F.R. § 222.5\(a\)](#). If you file an amended claim, you must include all factual allegations in the claim form itself, not in other documents, specifying how the respondent engaged in the allegedly infringing activity. To address this issue, your amended claim must include facts in the “Describe the infringement” section that describe acts infringing your copyrights, specifying how the respondent engaged in the infringing activity. You should be as detailed as possible, explaining how the respondent used the *copyrightable elements* of your work to create a derivative work.

## Copyright Infringement – Access

Your claim does not provide facts about how the respondent had “access” to your work. “Access” means a reasonable opportunity to view or hear your work before the alleged infringement took place. To address this issue,

you must file an amended claim that includes allegations that make access a reasonable possibility, not just hypothetically or theoretically possible. Acceptable allegations of access may include that your work (a) was sent directly to the respondent or a close associate of the respondent; (b) was widely disseminated or was available to the public or respondent; or (c) is so strikingly similar to the respondent’s work that the respondent could not have created it independently.

### **Copyright Infringement – Substantial Similarity**

Your claim also does not include enough facts that explain the similarities between your work and the respondent’s allegedly infringing work. If it is not readily apparent from supplemental materials that are submitted with the claim, you must provide some specific allegations about how your work and the allegedly infringing work are similar, and those similarities must relate to elements of your work that the copyright protects.

In the “Works infringed” section of the claim, you identify the allegedly infringed work as “Fairy Orbs” and describe the work as “[a] Glass orb filled with specific herbs, glitter and a fairy based on metaphysical properties.” However, the copyright registration for your work specifically excludes pre-existing materials used in your work (“glitter, material, arts/crafts feathers, material swatches, and ivy leaves, Glass hollow Ball/ornament”). The Copyright Act expressly excludes copyright protection for “any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.” 17 U.S.C. § 102(b). That means that while you may be able to protect the tangible creative expression of the specific look of your fairy orb, you cannot protect the idea of combining certain materials to create a fairy orb. *See* 17 U.S.C. § 102(a). Copyright exists in only tangible or fixed works of authorship and not the idea of combining certain materials to create a fairy orb. *See* 17 U.S.C. § 102(a). It protects elements of a work’s physical expression, not any metaphysical properties. Because of this rule, the materials used to create a work typically have little if any bearing on copyrightability. The fact that the respondent incorporated uncopyrightable elements of your preexisting work into their work does not necessarily mean that respondent’s work qualifies as a derivative work. Information about copyrightable authorship is available in [Chapter 300](#) of the *Compendium of U.S. Copyright Office Practices, Third*.

In the supplemental documents included with your claim, you filed what appears to be a [collage](#) that contains photographs of the allegedly infringed work. You also filed several .mov screen captures that show TikTok videos containing orb works. However, you do not clearly identify any copyrightable elements of expression in your work that appear in the allegedly infringing work, or state or show how they are identical or substantially similar. After filing the claim, you submitted several additional documents, including one labeled “[Examples of ELIZA’s shop items with derivatives of my item](#).” However, because it was filed separately from the claim, that document is not part of the claim, and it does not describe or show which elements of the respondent’s work you believe are substantially similar to protected elements of your work. As a result, the claim does not provide enough information to enable the respondent to understand the claim and respond to it.

If you submit an amended claim, it must include more factual allegations that support the element of substantial

similarity. Please provide more details and background regarding this element in your amended claim, including a clear, detailed statement regarding which portions of your work were taken by the respondent in the allegedly infringing work, or documents that are sufficient to show the similarities. If you include copies of the works at issue as supplemental documents, they must be clearly labeled and identified so they can be properly compared to each other. More information about the elements required to assert a claim of copyright infringement is available in the [Starting an Infringement Claim](#) chapter of the CCB Handbook.

### **Declaration of Noninfringement**

A claim for a declaration of noninfringement asks the Board to find that your actions do not amount to an infringement of the respondent's copyrighted work. 17 U.S.C. § 1504(c)(2). If someone has accused you of infringing their copyright, a noninfringement claim requests an official declaration that you did not infringe. The claim must identify the party that accused you of infringement and must describe your allegedly infringing activity, the reasons why you believe no infringement occurred, and the reasons why you believe there is an actual controversy about the requested declaration. [37 C.F.R. §§ 222.2\(c\)\(8\)\(i\) & \(iii\)-\(v\)](#).

Your noninfringement claim does not clearly state facts that meet those requirements. In the "Describe dispute with respondent(s) section of your claim, you state, "a dcma was put on etsy in regards to copyright infringement," but you do not detail what DMCA notice you are referring to or who sent it. Nothing included in the claim indicates that the respondent has accused you of infringing *their* copyright. Your allegations are not sufficient to support a claim for noninfringement because you state that the respondent "claims there is no infringement," which is contrary to a claim that you were wrongly accused of infringement.

If you keep your noninfringement claim if you file an amended claim, it must specifically describe an actual dispute between you and the respondent over whether your activities infringed the respondent's copyright, and why you believe that you did not infringe. You must provide enough information in your claim for the respondent to understand the claim and respond to it. For more information about what is required to support a claim of noninfringement, or misrepresentation please refer to the [Starting a Noninfringement Claim](#) of the CCB Handbook.

### **Misrepresentation Claim – Clarity**

You are also bringing a claim of misrepresentation in connection with a counter-notice under section 512(f) of the Copyright Act, as added by the Digital Millennium Copyright Act ("DMCA"). The elements of a section 512(f) misrepresentation claim are that:

1. The respondent sent an online service provider either
  - a. a DMCA takedown notice claiming online content or activity was infringing, or
  - b. a counter-notice denying infringement and claiming the online content was removed or disabled due to a mistake or a misidentification,
2. The respondent made a misrepresentation (a false or incorrect statement of fact) in the DMCA takedown

notice or counter-notice,

3. The respondent knew the misrepresentation was false or incorrect,
4. The misrepresentation was important to the online service provider's decision to take down or repost the content,
5. The online service provider relied on the misrepresentation, and
6. You were harmed as a result.

17 U.S.C. § 512(f). Your misrepresentation claim is not compliant because it does not make enough factual allegations about the alleged misrepresentation. You state that you sent Etsy a takedown notice in 2022, and that the respondent sent a counter-notice to Etsy, but your claim does not identify any false or incorrect statement of fact in the counter-notice. A section 512(f) misrepresentation claim must provide the words in the counter-notice that you allege were a misrepresentation, and an explanation of the alleged misrepresentation. [37 C.F.R. §§ 222.2\(c\)\(9\)\(vi\)-\(vii\)](#). In the section of the claim for the wording and explanation of the misrepresentation, you state only "unknown," which is not information about a statement in the counter-notice that you contend was false or incorrect.

If you maintain the misrepresentation claim in an amended claim, you must provide the words in the respondent's counter-notice that made up the misrepresentation, and explain what made those words false or incorrect. A document that you filed after submitting the claim, titled "Counter and corres," appears to be a copy of the text of an email from Etsy that included the counter-notice, which stated, "I swear under penalty of perjury that I have a good faith belief that the material was removed or disabled by mistake or because of misidentification of the material." If you contend that the counter-notice falsely stated that your takedown notice was mistaken or misidentified material as infringing, then you should state that contention in your amended claim, and attach that document to your amended claim.

To submit an amended claim, log into your eCCB account and take the following steps:

1. From your dashboard, click the "**Amend claim**" button and select your docket number from the dropdown list.
2. Your claim will unlock for editing. The information you originally entered will appear in the same order as in your original claim.
3. Make the necessary edits. If you have filed supplementary documents, you must re-upload any documents you wish to include in the amended claim on the "**Documentation**" page. *Please include only documents directly related to your claim, and label them clearly.*
4. Once you have completed your edits, continue to click through the fillable claim form until you reach the "**Review**" page. The Review page includes all the information that you have provided in the claim up to this point. Carefully double-check the information on this page. If you have any corrections, you can select "**Edit**" to revise any entries necessary. Each section of information has an "**Edit**" button, which will take you back to that section so you can make changes. After you make changes, you can click "**Save & review**"

to return to the Review page. Please review your claim carefully. Once you submit your amended claim, you will be unable to edit the claim while it is in compliance review.

5. Once you have completed your review and any revisions, you must confirm that the information in your claim is accurate and truthful to the best of your knowledge. To complete the declaration, type your full name into the “**Digital signature**” box near the bottom of the “**Review filing**” page and click “**Agree & submit.**”

If you have questions, please contact [asktheboard@ccb.gov](mailto:asktheboard@ccb.gov). Include your docket number in the subject line. The Board is unable to provide legal advice. We can only provide legal information and assistance concerning Board procedures and requirements. If you would like to seek further guidance from a lawyer or a law student at reduced or no cost, please visit the [Pro Bono Assistance](#) page on ccb.gov. You may also refer to the [Compliance Review](#) chapter of the CCB Handbook for more assistance.

Copyright Claims Attorney